United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2126

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOAN HULL, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

- against -

CELANESE CORPORATION, CELANESE FIBERS MARKETING CO.; JOHN W. BROOKS, VERNON E. JORDAN, GRAYSON M.-P. MURPHY and DR. JEROME B. WIESNER, Officers and Directors of CELANESE CORPORATION; and ALLAN R. DRAGONE, President of CELANESE FIBERS MARKETING CO.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640
Attorneys for Plaintiff-Appellant

Of Counsel:

Leonard B. Boudin
K. Randlett Walster
Eric M. Lieberman

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BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order entered by the United States District Court for the Southern District of New York (Owen, D.J.) on July 17, 1974 disqualifying plaintiff's counsel (293a).[1/] The court's opinion and order have not yet

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1/ References to "a" are to pages in the Joint Appendix.

been reported; they are set out in the Appendix at 293a-301a.

QUESTIONS PRESENTED

1. Whether Canon 9 of the American Bar Association Code of Professional Responsibility properly may be applied to disqualify plaintiff's counsel in a civil rights action where plaintiff's counsel has never represented defendants or been professionally associated with any attorney who has represented defendants and there has been no showing that any of the defendants' "confidences" or "secrets" have been received by plaintiff's counsel?

2. Whether the plaintiff's constitutional right to counsel of her choice in a civil rights action is outweighed by any legitimate interests of the defendant requiring disqualification of plaintiff's counsel?

3. Whether a woman employed as an attorney is entitled to consult with counsel of her choice to bring an action against her employer for sex discrimination?

STATEMENT OF THE CASE

PROCEEDINGS BELOW

On August 27, 1973 Joan Hull filed a complaint in the United States District Court for the Southern District of New York charging Celanese Corporation ("Celanese"), one of its operating divisions, Celanese Fibers Marketing Company ("CFMC"), and five officers and directors of Celanese with sex discrimination in employment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") 42 USC § 2000(e) (2a-37a). Hull brought the action on behalf of herself and the class of all past, present and future female employees and applicants for employment at CFMC during the period from April 8, 1967 to the date of the disposition of the action (3a).

On March 13, 1974, Hull moved to amend her complaint and to certify the case as a class action. At the same time five class members applied for leave to intervene in the action (49a-51a). One of the proposed intervenors, Donata Delulio, was employed as an attorney on Celanese's corporate staff (90a).

On March 27, 1974, defendants cross-moved to deny Delulio's application for intervention, to disqualify plaintiff's counsel, to strike plaintiff's class action allegations and to stay the action (98a-100a). Defendants' motions were

based upon allegations that Delulio had acted as counsel for Celanese in its defense against Hull's claims of sex discrimination (102a). Sharply conflicting affidavits describing the general nature of Delulio's activities on the Hull matter were submitted on both sides (101a-246a). Following argument on the defendants' motions on April 19, 1974 (247a-285a), the District Court on May 6, 1974 denied Delulio's application for intervention (286a-292a). Hull v. Celanese Corp., 375 F.Supp. 922 (S.D.N.Y. 1974). Without conceding the correctness of the court's decision, plaintiff's counsel severed relations with Delulio (Plaintiff's Memorandum in Reply to Defendants' Supplemental Memorandum, May 16, 1974, p.2). Nevertheless, by a subsequent opinion and order entered July 17, 1974 the District Court disqualified plaintiff's counsel, the firm of Rabinowitz, Boudin & Standard ("Rabinowitz firm"), from further representation of Hull in this action (293a-301a).[2/]

The District Court disqualified the Rabinowitz firm by reason of Canon 9 of the American Bar Assocation Code of

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2/ The District Court deferred consideration of plaintiff's motion for certification of the class and defendants' motion to strike the class allegations until Hull was "appropriately" represented by new counsel (300a-301a).

Professional Responsibility (hereinafter "Code" or "Code of Professional Responsibility"): "A lawyer should avoid even the appearance of impropriety." The District Court determined that there was "some evidence, . . . of the possibility that Delulio . . . did in fact transmit some [information within the attorney-client privilege] to the Rabinowitz firm, consciously or unconsciously" (297a, emphasis added). The Rabinowitz firm was found "remiss in not immediately recognizing either the substantial risk of actual disclosure, or the fact that their retention [by Delulio] would create the 'appearance of impropriety' because of the opportunity for improper disclosure" (299a-300a, emphasis added).

The court concluded:

> "Consequently, I am unwilling . . . to impose upon Celanese the slightest risk of even unintentional use against it of privileged information learned by Delulio while a member of its legal staff working on this very case" (300a).

Hull's countervailing right to be represented by counsel of her choice was found to be of "lesser" importance (299a) than "Celanese's right to a trial free of the risk of even unintentional use against it of matters within the attorney-client privilege" (298a). Moreover, the court determined that Hull's right "factually has been waived" as a result of her relationship with Delulio (299a).

STATEMENT OF FACTS

Defendants' employment discrimination against Hull dates back to 1966 (7a). She was denied promotions solely because of her sex in 1966, 1967, twice in 1968 and again in 1969 (7a-8a). On or about April 8, 1969, she filed her first charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC"). This charge was referred to the New York State Division of Human Rights ("State Division") which found probable cause to believe that defendants had discriminated against her (8a).

On September 19, 1969, Hull's charges were resolved through the State Division's conciliation process resulting in an agreement under which Celanese agreed to promote her to a managerial position by October 1, 1969 (8a-9a). However, in June 1971, eight months after Hull's promotion to Manager Group Buying Office, that position was abolished and she was demoted to Supervisor, Home Furnishings Merchandising. A year later, in June 1972 that position was also abolished and she was demoted a second time. Contemporaneously with Hull's second demotion, Celanese promoted a male with less experience and seniority to an open managerial position for which Hull was qualified and to which she was entitled (9a).

The following month, in July 1972, Donata Delulio began her employment at Celanese (90a). She initially was assigned to work for the Chemical Division but was promised a permanent assignment to work on CFMC matters (92a). In September 1972, Delulio met Hull socially through a mutual friend (183a). Hull and Delulio met only twice again in the succeeding year; once at a social luncheon in October of 1972 and once in January of 1973 at a luncheon attended by Celanese management women (183a-184a).

On or about September 19, 1972 Hull filed additional complaints of sex discrimination against Celanese with the EEOC. The EEOC again referred these charges to the State Division (9a-10a). In the spring of 1973 the State Division attempted to resolve Hull's complaint through conciliation. No agreement was reached and in April 1973, the State Division for the second time found probable cause to believe that Celanese had discriminated against Hull on the basis of sex (163a).

In May 1973, Delulio learned from a male Canadian attorney that Celanese had recruited him for a position with the CFMC legal group, the job promised to her. Despite his limited experience, he told Delulic that Celanese had offered him a starting salary $8,000 higher than her own starting salary (93a). In June,1973 Delulio met with Celanese General Counsel, James Scott Hill, to discuss her complaints of sex discrimination. Nevertheless it was at this meeting that Hill asked Delulio to do some work on Hull's sex discrimination complaints (166a).

After the State Division failed to conciliate Hull's second sex discrimination complaint, she retained the Rabinowitz firm to commence a class action under Title VII against her employers. Neither the Rabinowitz firm nor any of its members or associates have at any time represented interests adverse to those of Hull.

Hull's federal complaint was filed on August 27, 1973. Shortly thereafter, four other Celanese employees, Rosanne DiDio, Jacqueline Keely, Marilyn Karnes and Mary Swet, sought and obtained the Rabinowitz firm's representation in connection with their own sex discrimination complaints against Celanese (192a).

Delulio had no further contact with the Hull case after September 1973 (168a). Early in November 1973, Delulio contacted Hull and requested the name and address of her attorneys (184a). On or about November 9, 1973, Delulio requested the Rabinowitz firm to undertake her representation in an action for sex discrimination in employment (192a).

The initial meeting and subsequent conferences between Delulio and the Rabinowitz firm were devoted to establishing the facts surrounding her personal complaints of sex discrimination in compensation and in her professional assignment (193a-194a). On November 15, 1973, the Rabinowitz firm filed charges of sex discrimination on Delulio's behalf with the EEOC (192a). Apparently defendants received no notice of her complaint and she informed her employers of this action by a letter dated December 19, 1973 (138a).

On March 13, 1974, the Rabinowitz firm filed a motion to amend the complaint, to certify the case as a class action and to permit the intervention of the five employees referred to above (49a-51a). The proposed amended complaint (60a-89a) and Delulio's affidavit in support of intervention

(90a-97a) detail at length the personal experiences which form the basis for her allegations of sex discrimination. Nothing in Delulio's affidavit in support of her application to intervene or in the proposed amended complaint is based on anything she might have learned in connection with her work on the Hull matter.

Shortly after the applications for intervention were filed, defendants filed cross-motions to deny Delulio's intervention, to disqualify plaintiff's counsel and to strike the class allegations of plaintiff's complaint (98a-100a). In preparing a response to these papers, further conferences were held between Delulio and the Rabinowitz firm (189a-190a, 200a). At no time in these or any other conferences did Delulio reveal any privileged or confidential information (157a, 159a, 184a-185a, 188a-190a, 192a-194a, 196a, 198a, 200a, 202a, 203a, 205a-206a). Indeed she took the position and it was strenuously argued below that she possessed no confidential information on the Hull matter at all (157a-158a, 161a-181a).

Nevertheless, the District Court refused to permit Delulio's intervention in the Hull action because it found that

she had participated in an "active and substantial way in early stages of the defense to this very action" (287a), and possessed "substantial knowledge and information as to the Hull case obtained as a lawyer in defending against it" (288a). The District Court based its exclusion of Delulio on the rule of Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) which held that an attorney cannot represent a new client in a situation where it might use confidential information acquired from a previous client to the latter's disadvantage (288a-289a).[3/]

3/ The District Court also denied Delulio's application to intervene in the exercise of the court's discretion (290a-291a).

POINT I.

PLAINTIFF'S COUNSEL DID NOT VIOLATE CANON 9 OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

A. Heretofore, Canon 9 Has Not Been Applied to Protect the "Confidences" and "Secrets" of a Client by Disqualifying Attorneys With Whom the Client Never Had a Fiduciary Relationship.

The district court's order disqualifying plaintiff's counsel rests entirely upon a purported violation of Canon 9 of the Code of Professional Responsibility: "A lawyer should avoid even the appearance of impropriety."

The application of such general language must be limited to those situations which present the particular evils to which the Canon is addressed. This specificity is provided by the "Disciplinary Rules" and "Ethical Considerations" explicating Canon 9's meaning and by the judicial decisions which interpret and enforce it. Such definition and limitation is essential if Canon 9 is to provide meaningful guidance to attorneys in governing their conduct and to safeguard the rights of litigants.

Even far more specific language in codes of professional conduct has been thus limited by the United States Supreme Court. N.A.A.C.P. v. Button, 371 U.S. 415, 439-40; Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1; United Mine Workers v. Illinois State Bar Ass'n, 389 U.S.217; United Transportation Union v. State Bar of Michigan, 401 U.S. 576.

Canon 9 has been limited in practice in two important ways. First, it has been applied in accordance with the "Disciplinary Rules" and the related "Ethical Considerations" included under it in the Code.

It is clear on the face of it that these "Disciplinary Rules" have no bearing whatever on the present dispute, and the district court did not rely on any of them in reaching its decision. The basic thrust of Canon 9 is reflected in Disciplinary Rule ("DR") 9-101, which prohibits a lawyer from accepting private employment "in a matter upon the merits of which he has acted in a judicial capacity," DR 9-101(A); or "in a matter in which he had substantial responsibility while he was a public employee." DR 9-101(B). See e.g. City of New York v. General Motors Corporation, 501 F.2d 639 (2d Cir. 1974);

Handelman v. Weiss, 368 F.Supp. 258 (S.D.N.Y. 1973); United States v. Mahaney, 27 F.Supp. 463 (N.D.Cal.1939); Empire Linotype School v. United States, 143 F.Supp. 627 (S.D.N.Y. 1956); cf., United States v. Standard Oil Co., 136 F.Supp. 345 (S.D.N.Y. 1955). See also "Ethical Consideration" ("EC") 9-3. The Rule also provides that "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." DR 9-101(C). See also EC 9-4.

DR 9-102 and the related EC 9-5 deal specifically with an attorney's duties and responsibilities with respect to the funds and property of a client. See, e.g., Hafter v. Farkas, 498 F.2d 587 (2d Cir. 1974).

There thus can be no claim that the Rabinowitz firm violated the "Disciplinary Rules" and the related "Ethical Considerations" of Canon 9. Neither the firm nor its lawyers ever acted in a judicial capacity or as government attorneys, ever attempted improper influence peddling, or ever misapplied a client's funds or

property. [4]

The second context in which Canon 9 has been applied in disqualification cases is where there is a substantial risk that the attorney has violated or may violate another specific Canon of the Code, usually Canon 4: "A lawyer should preserve the confidences and

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4/ There are several additional "Ethical Considerations" under Canon 9, which are considerably less specific than those which relate directly to the "Disciplinary Rules." They state the duty of attorneys to promote confidence in the legal system and in the legal profession (EC 9-1), to serve the interests of clients and the public in an ethical manner (EC 9-2), and to uphold the honor and integrity of the legal profession (EC 9-6). These provisions add little in the way of clarity to the vague injunction of Canon 9 itself. This reflects the nature of the "Ethical Considerations" which, unlike the "Disciplinary Rules," are "aspirational" rather than "mandatory" in character, and "represent the objectives toward which every member of the profession should strive." Code of Professional Responsibility, Preliminary Statement.

secrets of a client." [5/] See, e.g., Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); Motor Mart, Inc. v. Saab Motors, Inc., 359 F.Supp. 156, 157 (S.D.N.Y. 1973).

Here, there has not been and cannot be a claim that the Rabinowitz firm violated or could violate another provision of the Code. With respect to Canon 4, neither the firm nor any of its partners, associates, or staff ever have represented or been employed directly or indirectly by the Celanese Corporation or its subdivisions. In short, Celanese never has been the client of the

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5/ The "Disciplinary Rules" promulgated pursuant to Canon 4 provide that, with certain exceptions, a lawyer shall not knowingly:

> "(1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." DR 4-101(B).

Rabinowitz firm. It thus would be impossible in the context of his case for the Rabinowitz firm to use "confidences" or "secrets" obtained from Celanese as a former client.

I every case in which there has been a disqualification of an attorney based upon Canons 9 and 4, the attorney disqualified was in a position to use the confidences of his own former client against that client. See, e.g., Emle Industries, Inc. v. Patentex, Inc., supra; Richardson v. Hamilton International Corp., 469 F.2d 1382 (3rd Cir. 1972), cert. den. 411 U.S. 986; Motor Mart, Inc. v. Saab Motors, Inc., supra. Cf. Meyerhoffer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974), pet. cert. filed 43 U.S.L.W. 3215 (Oct. 15, 1974); Silver Chrysler Plymouth, Inc. v. Chrysler Motors, Inc., 370 F. Supp. 581 (E.D.N.Y. 1973), app. pending (2d Cir. Dkt. Nos. 74-1104, 74-1095).

The Emle case is typical of this application of Canon 9, i.e., to disqualify an attorney because of the possibility that he or she might violate Canon 4.

There, the plaintiff's attorney previously had represented the part-owner of the defendant in a "substantially related" case. This court held that Canons 4 and 9 implicitly incorporated the admonition of Canon 6 of the old Canons of Professional Ethics[6/] forbidding an attorney to represent a client with interests adverse to those of his former client. 478 F.2d at 570. The basis for the decision was a presumption that the attorney who by reason of his previous fiduciary relationship possessed "confidences" and "secrets" of his former client would be in a position to use those confidences on behalf of new clients against the interests he formerly represented. Since the "confidences" and "secrets" were in the attorney's mind, there was no assurance against improper use; even an attorney with the best of motives might unconsciously use what he undoubtedly knew. 478 F.2d at 571.

6/ The present Code of Professional Responsibility superseded the old Canons of Professional Ethics on January 1, 1970.

The Emle court found authority for its decision in an opinion of the American Bar Association Standing Committee on Professional Ethics that a

> "lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact." Informal Opinion No. 885 (Nov. 2, 1965). (Emphasis added)

In short, Canon 9 was applied in Emle and similar cases to protect against potential violations of Canon 4 by the lawyer subject to Canon 4. Its use in that context had no application to an attorney who never represented the adverse party himself or was professionally associated with a former representative of the adverse party. Cf. T.C. & Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953); American Can Company v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Allied Realty of St. Paul, Inc. v. Exch. Nat. Bank of Chicago, 408 F.2d 1099, (8th Cir. 1969), cert. den. 396 U.S. 823; Hawk Industries, Inc. v. Bausch & Lomb, Inc., 59 F.R.D. 619 (S.D.N.Y. 1973); W. E. Bassett Company v. H. C. Cook Co., 201 F.Supp. 821

(S.D.N.Y. 1961), aff'd per curiam, 302 F.2d 268 (2d Cir. 1962).

This court's decision in Meyerhoffer v. Empire Fire & Marine Insurance Co., supra, indicates in a far more extreme case the inapplicability of Canon 9 in the context of the present case. In Meyerhoffer, an attorney who had previously represented defendants actually disclosed substantial confidences from his former client to plaintiff's counsel. Yet this court did not consider the applicability of Canon 9 (or any other Canon) to the lawyer who had not represented the defendant. Its sole concern was with the conduct of the lawyer with a fiduciary relationship to the defendant, and as to him, the court directed the inquiry (which the court below did not do) into the extent and purpose of his disclosures to the plaintiff's attorneys.

Thus it is apparent that the district court relied on neither of the only two bases upon which Canon 9 heretofore has been applied. Instead, it applied Canon 9 to disqualify the Rabinowitz firm because of an alleged risk that plaintiff's counsel even unintentionally might use privileged information learned by Delulio against

Celanese (300a).

B. There Is No Risk That Plaintiff's Counsel Might Use "Secrets" Or "Confidences" of Celanese Against It and Hence No Appearance of Impropriety Since the Rabinowitz Firm in Fact Received No "Secrets" Or "Confidences" From Delulio.

The alleged risk of the Rabinowitz firm's use of confidences was based upon the possibility that Delulio had consciously or unconsciously disclosed them. This reasoning is the product of a misunderstanding and misapplication of Emle Industries, Inc. v. Patentex, Inc., supra, and presents a classic example of how a rational and salutory principle of law, when extended to a non-analogous situation, creates unjust results not conceivably intended by the court which laid down the original rule. Cf. Consolidated Theatres, Inc. v. Warner Brothers Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954).

The Emle case was based upon two assumptions, both crucial to its result. First, the Emle court presumed that an attorney who works on a case receives "confidences" and "secrets" from his client. Second, the Emle court assumed that an attorney who possesses such "confidences" and "secrets" cannot avoid using them,

consciously or unconsciously, if he subsequently is retained by a party adverse to his former client on a "substantially related" case:

> "Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in an earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety. In neither event would the litigant's or the public's interest be well served." 478 F.2d at 571.

These two assumptions led the Emle court to apply its "strict prophylactic rule" prohibiting an attorney who previously had represented one side in a case from switching sides to represent an adverse party. The interest protected was the use, either consciously or unconsciously, of a confidence presumptively acquired by the attorney by virtue of his former representation. 478 F. 2d at 571.

In the instant case, in contrast, the question is not whether the Rabinowitz firm might unconsciously use information gathered from a former representation;

rather the question is whether the firm ever obtained "confidences" or "secrets" concerning Celanese from Delulio. The first Emle presumption does not apply because there was no fiduciary relationship between the Rabinowitz firm and Celanese; thus there is no basis for assuming that the firm possesses any Celanese "confidences" or "secrets."[7/] There could be no issue of the improper use of Celanese's confidences unless it could be shown that the firm in fact obtained them. Cf. Meyerhoffer v. Empire Fire & Marine Insurance Co., supra. Fielding v. Brebbia, 479 F.2d 195, 198-99 (D.C.Cir. 1973); Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), cert. den. 350 U.S. 932; T.C. & Theatre Corp. v. Warner Bros. Pictures, supra at 271.

7/ The issue of an attorney's actual possession of confidences is presumptively resolved in Emle in order to protect the former client's confidences from being revealed. However, a factual inquiry into whether the Rabinowitz firm possesses Celanese confidences would not jeopardize their confidentiality. Such an inquiry would not be concerned with what Celanese told Delulio but would be limited to what Delulio told the Rabinowitz firm. Thus the rationale for resolving the issue of possession of confidences presumptively is wholly inapplicable here. Morever, Celanese would lack standing to argue that no inquiry could be made into the Delulio-Rabinowitz relationship on the ground that the confidentiality of that relationship should not be disturbed.

With respect to the second presumption, although an attorney might unconsciously use "confidences" against his former client because he possesses information from the former relationship which cannot be segregated and compartmentalized in his mind, this concern has no application to the Rabinowitz firm. They would know immediately if they had received any arguably confidential information or secrets. There are no mysterious psychological processes at work here. Information is not received unconsciously; whether or not plaintiff's counsel has obtained Celanese's "confidences" is a concrete fact which can be determined empirically. And the Rabinowitz firm has denied unequivocably that it ever received such "confidences" or "secrets."

Nor could it be presumed that the Rabinowitz firm possesses any Celanese confidences. Such a presumption would depend upon an assumption that Delulio violated her professional responsibility to Celanese in disclosing confidences and that the Rabinowitz firm's sworn denials that they received any confidences are perjured. Indeed, the presumption is quite the opposite, as it must be if the legal profession is to exist in its present form.

The T.C. & Theatre's case on which the Emle court relied is particularly instructive. There, Cooke, one of the plaintiff's attorneys in a private anti-trust action, had formerly represented the defendant Universal Pictures, Inc., in a government anti-trust suit. Cooke later brought an action against Universal for his fee, in which he was represented by Kahan, his co-counsel in the private anti-trust suit against Universal. Both the fee case and the private anti-trust action were pending at the same time. Because of Cooke's prior representation of Universal, he was disqualified in the private anti-trust action as long as Universal was a party defendant, but his co-counsel, Kahan, was not disqualified. Moreover, Kahan continued to represent Cooke in the fee case against Universal.

The court assumed that Cooke had confidential information relevant to the case which he learned in his prior representation of Universal, however, in the absence of any evidence to the contrary[8/] it refused to assume that Cooke had disclosed this information to Kahan.

8/ The court found no evidence to support an inference of disclosure in the record of the case before it or in a deposition taken by Universal of Cooke in the fee suit.

> "The Court is not required to indulge in any presumption that Cooke has divulged confidences reposed in him by his former clients simply because he is now engaged in a lawsuit with them. The presumption would be to the contrary." 113 F.Supp. at 272. (Emphasis added)[9]

In the absence of a showing of actual receipt of confidential information, the right of counsel to remain in the case from which his co-counsel is disqualified has been recognized by all courts that have considered the problem.[10] American Can Co. v. Citrus Feed Co., supra;

9/ Thus, if Delulio and the Rabinowitz firm had both represented Hull in a suit against Celanese and the Rabinowitz firm contemporaneously represented Delulio against Celanese in an action for her wages, Delulio could be disqualified as counsel from the Hull action, but the Rabinowitz firm would not be barred from representing either Hull or Delulio. This presumption of non-disclosure means that there can be no appearance of impropriety in Delulio's contact with the Rabinowitz firm.

10/ Indeed, even if actual disclosure were shown, the court would then have to consider the extent and justification for the disclosure, Meyerhoffer v. Empire Fire & Marine Insurance Co., supra.

Hawk Industries, Inc. v. Bausch & Lomb, Inc., supra; T.C. & Theatre Corp. v. Warner Bros. Pictures, Inc., supra; W. E. Bassett Company v. H. C. Cook Co., supra;[11] Cf. Allied Realty of St. Paul, Inc. v. Exch. Nat. Bank of Chicago, supra.

Even an attorney disqualified because of previous representation of one or more of the defendants has been permitted to represent the same plaintiff against those defendants whom he had not previously represented. See T. C. & Theatre Corp. v. Warner Bros. Pictures, supra; Fisher Studio, Inc. v. Loew's, Inc., 232 F.2d 199 (2d Cir. 1956) cert. den., 352 U.S. 836.

11/ Doe v. A. Corp., 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd per curiam sub nom. Hall v. A. Corp., 453 F.2d 1375 (2d Cir. 1972), an egregious case of an attorney's willful misconduct, is not to the contrary. There, the plaintiff-attorney Hall brought a stockholder's derivative action against a former client of the law firm at which he was employed based exclusively on confidences which had been disclosed to him in his fiduciary capacity. Hall's bad faith was further evidenced by the fact that he purchased the one share of stock which gave him standing to initiate the litigation after being told that his employment with the firm would be terminated. Hall's co-counsel was barred from representing any other plaintiffs in an action arising out of the same facts upon which Hall's action was based. The co-counsel's disqualification was appropriate because he had necessarily received "secrets" and "confidences" of the defendant corporation since such information was the sole basis for Hall's suit.

Here, the defendant has utterly failed to produce even a scintilla of evidence to rebut the presumption that the Rabinowitz firm in fact acted with propriety and did not receive Celanese's "secrets" or "confidences." Indeed, the only evidence on the point supports the presumption of non-disclosure: Delulio and each partner and associate of the Rabinowitz firm have sworn in affidavits that no disclosures took place (156a, 187a, 191a, 195a, 197a, 199a, 201a, 203a, 205a). Accordingly, there is no basis whatsoever for the district court's action; the defendants have not made a sufficient showing even to entitle them to a hearing on the issue.

POINT II.

THE INAPPLICABILITY OF CANON 9 TO THE PRESENT SITUATION IS UNDERSCORED BY THE FACT THAT THE POLICIES CENTRAL TO THIS COURT'S HOLDING IN EMLE INDUSTRIES ARE DEFEATED RATHER THAN ADVANCED BY THE DISTRICT COURT'S ORDER OF DISQUALIFICATION.

In Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-5 (2d Cir. 1973), this court prefaced its decision as follows:

> "We approach our task as a reviewing court in this case conscious of our responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. This balance is essential if the public's trust in the integrity of the Bar is to be preserved."

A similar approach to the interests involved in the instant case compels reversal of the district court's disqualification order.

A. Hull's Exercise Of Her Right To Freedom Of Association Cannot Deprive Her Of Her Right To Counsel Of Her Choice.

The order of disqualification deprives Hull

and the intervenors of their fundamental right to be represented by the attorneys of their choice.[12] Powell v. Alabama, 287 U.S. 45, 53; Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968); Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966), cert. den., 385 U.S. 987. Plaintiff's freedom to choose her own counsel is particularly important because she requires vigorous and experienced representation in the specialized area of civil rights litigation. Cf. Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824, 827 (2d Cir. 1955) cert. den. 350 U.S. 932.

> "Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. [Citations omitted] ... [I]t must include the right to join together for the purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights." N.A.A.C.P. v. Button, 371 U.S. 415, 452-3 (Harlan, J., dissenting).

12/ Conversely, plaintiff's counsel has a right cognizable under the First Amendment and Fifth Amendment to represent plaintiffs in civil rights cases. Taylor v. Kentucky State Bar Association, 424 F.2d 478 (6th Cir. 1970).

The district court's treatment of Hull's fundamental rights to associate and litigate can be described, at best, as offhand and casual. It held that Hull's rights were of less significance than Celanese's protection against the possibility that confidences would be used against it without making a close analysis of the interests actually involved and of the "least restrictive means" of accommodating them. Cf. N.A.A.C.P. v. Alabama, 377 U.S. 288, 307; Shelton v. Tucker, 364 U.S. 479, 488.

Ultimately, the district court found that Hull had waived her right to counsel of her choice by her association with Delulio (299a).[13/] The court felt Hull "should have sensed a basic impropriety in her relationship with Delulio" (299a). Thus despite its pro forma disclaimer (299a), the district court improperly charged Hull, a lay person, with duties and responsibilities under the Code of Professional Responsibility equal to or greater than those of an attorney. Cf., Allied

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13/ Indeed, it was Celanese rather than Hull which waived its right to object to Delulio's participation herein by assigning her to work on the Hull case after receiving notice of her own claim of sex discrimination. See discussion, infra, p. 46, fn. 21.

Realty of St. Paul, Inc. v. Exch. Nat. Bank of Chicago, 408 F.2d 1099, 1102 (8th Cir. 1969), cert. den. 396 U.S. 823.

This view is unsupportable. It is in plain disregard of the fact that Hull's associations and relationships for litigative or social purposes lie at the core of First Amendment protections. See, e.g., N.A.A.C.P. v. Button, supra at 429-430; Brotherhood of Railroad Trainmen v. Virginia State Bar, 371 U.S. 1. In short, the district court purported to find a waiver of Hull's constitutional rights in acts which were not at all improper and, indeed, were themselves exercises of the very rights protected by the Constitution.

B. The Protection Of Celanese's Attorney-Client Confidences Does Not Require Plaintiff's Counsel's Disqualification.

1. There Has Been No Disclosure by Delulio of Celanese's "Confidences" or "Secrets."

There is not a scintilla of evidence to indicate that Delulio has disclosed to the Rabinowitz firm any "confidences" or "secrets" gained through her employment as an attorney at Celanese. In fact, there is conclusive and unrebutted evidence to the contrary. See

Point I, supra at 21. It is in this context that the protection of Celanese's confidences must be weighed against the deprivation of Hull's constitutional rights.

2. There Is No Confidential Or Privileged Information Which Requires Protection Through Plaintiff's Counsel's Disqualification.

The district court felt compelled to protect Celanese from "the slightest risk of even unintentional use against it of privileged information" (300a). Realistically, there is no problem regarding the use of privileged information against defendants.

The district court's concern with this issue grew out of its apparent confusion betwen the concepts of truly privileged communications, on the one hand, and confidential information or communications revealed in the course of an attorney-client relationship, on the other.

Defendants would be protected against the use of privileged communications as evidence against them by the exclusionary rule which completely prohibits their introduction at trial. This protection is not diminished if Delulio or any other Celanese attorney disclosed privileged statements to a third person. 8 Wigmore, Evidence, (§§ 2324 and 2325. McNaughton Rev. 1961)

Defendants cannot claim that they need protection against the Rabinowitz firm's out of court use of privileged information communicated to Delulio. First, there has been no showing that Delulio possessed any truly privileged information.[14] Second, there is no evidence

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14/ As a general matter all relevant evidence is admissible unless excluded by specific rule, 1 Wigmore, Evidence, supra, § 10 at p. 293. The attorney-client privilege will exclude communications only if made in the course of a professional relationship and in confidence between an attorney and client. In order for a communication between a corporation and its in-house counsel to be privileged, it must be made to the employee/attorney in his capacity as an attorney. If he is performing non-legal work, no privilege attaches. Merrin Jewelry Co. v. St. Paul Fire and Marine Insurance Co., 49 F.R.D. 54 (S.D.N.Y. 1970, Frankel, J.); Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp. 546 (D.D.C. 1970); Comercio E Industria Continental v. Dresser Industries, Inc., 19 F.R.D. 513 (S.D.N.Y. 1956).

In addition, the communication must be from a responsible member of management or from a person with the authority to control or substantially participate in a decision regarding the action to be taken on advice of counsel. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968). The communication must relate to a request for legal advice regarding corporate affairs. Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D.Pa. 1970); Congoleum Industries, Inc. v. GAF Corporation, 49 F.R.D. 82 (E.D.Pa. 1969), aff'd without opinion, 478 F.2d 1398 (3rd Cir. 1973); City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483 (E.D.Pa. 1962).

There are other limitations on the availability of the attorney-client privilege. It does not extend to communications secured from a potential witness while the

of any disclosures by Delulio. Delulio denies making any such disclosures and all associated with the Rabinowitz firm affirm that they never received any disclosures. Third, the possibility of such disclosures has been eliminated by Delulio's exclusion from this action. Fourth, if defendants nevertheless feel that such a risk exists now, they can seek an injunction against Delulio's disclosure of privileged information to plaintiff's counsel. Meyerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974); Greene v. Singer, 461 F.2d 242 (3rd

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14/ (Cont'd.)
attorney is preparing for anticipated litigation. Hickman v. Taylor, 329 U.S. 495; Xerox Corp. v. I.B.M. Corp., F.Supp. (S.D.N.Y. 1974), 43 U.S.L.W. 2061 (Aug. 20, 1974). If the communications are not made in confidence, the privilege is lost. For instance, it is lost if a third person is present (8 Wigmore, Evidence, supra, §§ 2311, 2326); if the information will be passed on to a third person, (United States v. McDonald, 313 F.2d 832 [2d Cir. 1963]; Colton v. United States, 306 F.2d 633 [2d Cir. 1962], cert. den., 371 U.S. 951); or if the information appears in the general files of the corporation (United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 [E.D.Mich. 1954]; Cote v. Knickerbocker Ice Co., 160 Misc. 658, 290 N.Y.Supp. 483 [1936]). If the communication consists of a pre-existing document, such as personnel files, reports and memoranda, there is no privilege, 8 Wigmore, Evidence, supra § 2307; United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); In re Colton, 201 F.Supp. 13 (S.D.N.Y. 1961), aff'd sub nom. Colton v. United States, supra; Grant v. United States, 227 U.S. 74.

Cir. 1972), cert. den., 409 U.S. 848.

Finally, privileged communications would be of little or no relevance in the litigation of Hull's complaint. The discovery and proof in a Title VII action is primarily a statistical matter.[15] Such actions--unlike suits for price fixing, monopolization or insider trading--do not present issues of conspiracy, motive and fraudulent intent, the proof of which could be contained in privileged communications to an attorney.[16]

Confidential communications are not as rigorously protected as communications which are privileged.[17]

15/ Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. den., 401 U.S. 954; United States v. International Brotherhood of Electrical Workers, Local 38, 428 F.2d 144 (6th Cir. 1970), cert. den., 400 U.S. 943. See also United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. den., 404 U.S. 984. In Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970), the court held that statistics alone could establish a violation of Title VII.

16/ See e.g., Plaintiff's Interrogatories to Defendant Celanese dated October 30, 1973 requesting detailed statistical information on the composition, mobility and compensation of Celanese employees (Nos. 5-10; 17-24).

17/ Nearly all of the information referred to in defendants' affidavits is of this latter, nonprivileged type: e.g., personnel files (140a, 231a), documents from the minority relations department (148a, 243a), and interviews of prospective witnesses (109a, 141a).

An attorney is prohibited from disclosing or using such information in the absence of an appropriate justification for doing so. However, this information, unlike privileged information, is not absolutely protected. The attorney can reveal it if necessary to protect his own rights. Meyerhoffer v. Empire Fire & Marine Insurance Co., supra; Marco v. Dulles, 169 F.Supp. 622 (S.D.N.Y. 1959), app. dismissed 268 F.2d 192 (2d Cir. 1959). The attorney can also be called to testify regarding any nonprivileged communications. Meyerhoffer v. Empire Fire & Marine Insurance Co., supra; Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); Modern Woodmen of America v. Watkins, 132 F.2d 352 (5th Cir. 1942); Steiner v. United States, 134 F.2d 931 (5th Cir. 1943), cert. den. 319 U.S. 774; Bank of America v. Saville, 416 F.2d 265 (7th Cir. 1969), cert. den. 396 U.S. 1038.

Plaintiff had, prior to any contact with Delulio, propounded extensive interrogatories which requested information on all the items referred to in Hull's complaint of which defendants assert Delulio had know-

ledge.[18] Because plaintiff is entitled to such information in the ordinary course of discovery, there is absolutely no rationale for disqualifying her counsel in order to protect the transmittal or availability of any of the same information to Delulio.

C. The Interests of Public Policy Require That The Order of Disqualification be Reversed.

The District Court found that the public interest was undermined by the Rabinowitz firm's continued representation of Hull because of the risk that Delulio

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18/ See e.g., Plaintiff's Interrogatories to Defendant Celanese dated October 30, 1973 requesting detailed information on, among other things, Hull's employment at Celanese (Nos. 26-39); the 1972 force reduction (Nos. 41-45); meetings or discussions regarding the elimination of the managerial positions held by Hull (Nos. 46-47); meetings or discussions relating in whole or in part to Hull (No. 48); meetings or discussions regarding sex discrimination within Celanese or CFMC (No. 49); meetings or discussions regarding complaints of sex discrimination (No. 50); meetings or discussions regarding equal employment opportunity at Celanese or CFMC (Nos. 51-53); affirmative action plans or policies (No. 55); studies and reports on equal employment opportunity including any prepared by consultants (Nos. 56-59).

might have disclosed Celanese's confidences to the firm which the firm would then be able to use against Celanese. However, this possibility was more than adequately guarded against by Delulio's exclusion from the action. The action of plaintiff's counsel in severing relations with Delulio--even though they considered such an extreme measure to have been unnecessary--completely eliminated any conceivable appearance of impropriety. Disqualification of the Rabinowitz firm arguably would be necessary only if improper disclosures had in fact taken place. Public confidence in the legal profession is clearly not fostered by the court's assumption that a member of the bar would in fact make improper disclosures when presented with an opportunity to do so.

Moreover, the public interest is quite vitally concerned with another policy which never even occurred to the judge below: vindication of employees' rights under Title VII of the 1964 Civil Rights Act.

The right to employment free from discrimination on the basis of race, sex or other impermissible criteria is of fundamental importance both to individuals who seek to enforce their rights to equal employment

opportunity and to the society at large. The rights asserted by Hull in this action grow out of basic concepts of human equality which are integral to our form of government and political system. These bedrock values of equality require the most solicitous protection by the judicial system.

The federal courts, through the active participation of "private attorneys-general" and the class action device are primarily responsible for the vigorous enforcement of Title VII. However, defendants' motions to exclude an applicant for intervention, to disqualify plaintiff's counsel and to strike the class allegations from plaintiff's complaint would defeat this action as an effective mechanism for requiring defendant's adherence to Title VII.

The likelihood of further fragmentation of this action runs throughout the district court's consideration of defendants' motions. Delulio is precluded from participating in this action altogether (286a). Delulio may not be able to bring a federal action at all (279a-280a); Hull may be an improper class representative because of her association with Delulio (269a); the question of what Hull, Delulio and the other intervenors

discussed may affect other Celanese employees' ability to join in this action and to have it maintained as a class action (264a).[19] Thus, the court's over-zealous protection of Celanese's relationship with Delulio may result in the destruction of the substantive rights of litigants.

The Code of Professional Responsibility is fundamental to the fair administration of justice and protects litigants and the public against attorneys who would utilize their professional advantage for purely personal gain. N.A.A.C.P. v. Button, supra at 439-40. However, in a conflict between the terms of the Code and an individual's constitutionally protected rights, the Code must be accommodated in a way which will not transgress upon the fundamental rights of a citizen. This precise problem has come up in a variety of settings and the balance has been struck as we suggest.

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in

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19/ The effect of Delulio's taint on Hull and the other intervenors as class representatives will be determined when the district court considers the motions regarding class treatment. (300a).

> any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, 7.

See also, N.A.A.C.P. v. Button, supra; United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217; United Transportation Union v. State Bar of Michigan, 401 U.S. 576; Taylor v. Kentucky State Bar Association, 424 F.2d 478 (6th Cir. 1970); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968).

POINT III.

THERE COULD BE NO "APPEARANCE OF IMPROPRIETY" BECAUSE DELULIO HAD A CONSTITUTIONAL RIGHT TO SUE AND TO CONSULT ATTORNEYS OF HER OWN CHOICE.

A. Delulio Can Sue Her Employers For Sex Discrimination.

Delulio sought to intervene in the present action as an aggrieved party, not as an attorney. She claimed that Celanese discriminated against her on the basis of sex in violation of the Civil Rights Act of 1964. She thereby exercised her First Amendment right to freedom of expression and association which includes the right to institute federal litigation to protect her civil rights.

In the related situation of litigation for the purposes of eliminating racial discrimination, the Supreme Court held:

> "[Litigation] is a means for achieving the lawful objectives of equality of treatment. . . for the members of the Negro community in this country. It is thus a form of political expression . . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." N.A.A.C.P. v. Button, 371 U.S. 415, 429-30.

There surely is no question that litigation raising claims of discrimination based upon sex is of the highest priority and is entitled to the same protection as the claims of racial discrimination in Button. Indeed, even in actions not directly involving civil rights issues, access to the courts has repeatedly been protected. The holdings of the Supreme Court in this area are unequivocal. "The right of access to the courts is indeed but one aspect of the right to petition." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510. See also, Sutton v. County Court of Racine Co. Wisc. Br. IV, 353 F.Supp. 716 (E.D.Wisc. 1973).

It is unthinkable that Delulio's status as an attorney would deprive her of civil rights guaranteed by the federal constitution and the federal civil rights statutes. The Code of Professional Responsibility can not be interpreted to restrict rights under the Civil Rights Act.[20/] Cf., N.A.A.C.P. v. Button, supra; Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1. No provision of the Code forbids an attorney to

20/ To the extent that the Code is ambiguous, it should be read to conform with the statute to avoid questions of constitutionality and supremacy. Cf., Kent v. Dulles, 357 U.S. 116.

sue his employer for vindication of rights growing out of the employment relationship and the Code has never been interpreted or applied to limit such an action.

The only possible barrier to such litigation arises indirectly from Canon 4's restriction against revealing the "confidences" or "secrets" of a client. However, the Code and the cases provide for exceptions to Canon 4 where the lawyer seeks to redeem rights arising out of the employment relationship itself.

In the instant case, there can be no bar to Delulio's right to sue. We have see (Point I, supra) that Delulio did not reveal "confidences" or "secrets" obtained from her professional relationship with Celanese, if indeed she ever received them. Indeed, there never would have been a need for her to reveal such secrets. Delulio's action was not based upon confidential information disclosed to her in the course of her representation of Celanese; rather, it grew out of her personal experience of the manner in which she was compensated, an aspect of defendants' limit-

ation of her employment opportunities.[21/]

It is clear, however, that even if Delulio would have had to reveal "secrets" and "confidences" in order to sue, she could properly do so. It long has been the rule that:

> "The lawyer may disclose confidential communications in subsequent litigation between the attorney and client where it becomes necessary so to do to protect the lawyer's rights." Wise, Legal Ethics, 277 (1970).

In its classic opinion on the subject, the American Bar Association cautioned that such secrets should be revealed only when "reasonably necessary," but concluded that:

> "It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the

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21/ Indeed, defendants were put on notice of Delulio's claim of salary discrimination prior to her slight involvement in the Hull case. It was at a meeting with Celanese's general counsel to discuss her own complaint that she was asked to write a memorandum on the Hull matter (165a-166a). Under such circumstances, Celanese waived its objection to Delulio's disclosure of confidences. United States Fidelity and Guarantee Co. v. Bolding, 447 F.2d 462, 464 fn. 1 (10th Cir. 1971). Otherwise, an employer could preclude attorneys from suit under the Civil Rights Act by divulging confidences after learning of a possible grievance.

> means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy." A.B.A.Formal Opinion No. 250 (June 26, 1943).

See also D.R. 4-101(C); Meyerhoffer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974); Marco v. Dulles, 169 F.Supp. 622 (S.D.N.Y. 1959), app. dismissed 268 F.2d 192 (2d Cir. 1959). The A.B.A. opinion itself implicitly recognizes that the degree of disclosure is a matter of delicacy and discretion that must be determined by the attorney himself, at least in the first instance.

Doe v. A. Corp., 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd per curiam sub nom. Hall v. A. Corp., 453 F. 2d 1375 (2d Cir. 1972), and Richardson v. Hamilton International Corp., 469 F.2d 1382 (3d Cir. 1972), cert. den. 411 U.S. 986, are inapposite. Neither case involved the attorney's right to sue to protect rights arising out of the employment relationship with his client. In contrast, both Doe and Richardson were stockholders' derivative actions in which the attorney-plaintiffs acquired their shares of stock voluntarily and under questionable circumstances.

Moreover, the attorney-plaintiffs in Doe and Richardson were also acting as counsel in their own class

actions. This raised the considerable issue of the extent to which they may have been attempting to use the confidential information previously acquired and upon which those actions were based and create a windfall not only in terms of a personal recovery but through an award of attorney's fees for representing a class of shareholders. Thus there was no injustice in holding that the attorneys could not take advantage of their former professional relationships in bringing actions against former clients which would require disclosure of the former clients "secrets" and "confidences." Delulio, of course, sought intervention here only as a plaintiff.

B. Delulio Was Entitled To Seek Representation From the Rabinowitz Firm in Prosecuting Her Action For Sex Discrimination.

Delulio attempted to intervene in a pending class action which sought across the board relief for defendants' practices of sex discrimination. Considerations of judicial economy and effective vindication of employees' rights under Title VII have resulted in a strong judicial preference for the litigation of Title VII claims in class actions because the discrimination which plain-

tiffs seek to redress "is by definition class discrimination." Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968), cert. den. 393 U.S. 1108; Jenkins v. United Gas Corp., 400 F. 2d 28, 33 (5th Cir. 1968); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970).

The fact that Delulio's consultation with the Rabinowitz firm created an opportunity for her to disclose "confidences" to them did not require application of the "strict prophylactic rule" of Emle Industries, Inc. v. Patentex, Inc., 478 F. 2d 562 (2d Cir. 1973) since she was consulting counsel in an effort to vindicate her own rights.[22/] Indeed, this court in Meyerhoffer v. Empire Fire & Marine Insurance Co., supra, found no impropriety in an attorney's actual disclosure of extensive confidences which were extremely damaging to his former client when disclosure was necessary to protect his own professional reputation. The attorney in Meyerhoffer could have retained his own independent counsel,

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22/ No appeal was taken from the district court's order denying Delulio's application for intervention since it was based upon the court's exercise of discretion in permitting intervention as well as upon its application of Emle, and hence was not an applealable order (290a - 291a).

but instead he went directly to the attorneys suing his former client and made his disclosures to them. This court, recognizing the wisdom of permitting the attorney to vindicate his interests in the most efficient and effective way, found no impropriety in his disclosure. Thus, although the district court erred in confusing Delulio's right to intervene in this action with Hull's right to be represented by counsel of her choice, (see discussion Point I, supra), it also erred in its application of the Emle rule to require Delulio's exclusion from this case for she was entitled to seek effective representation of her choice in vindicating her civil rights.

CONCLUSION

FOR THE REASONS STATED ABOVE, THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT BELOW DISQUALIFYING PLAINTIFF'S COUNSEL

Dated: New York, New York
December 2, 1974.

Respectfully submitted,

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640
Attorneys for Appellant

LEONARD B. BOUDIN
K. RANDLETT WALSTER
ERIC M. LIEBERMAN

Of Counsel

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ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL
ATTORNEYS FOR defts - appellees